GOVERNMENT OF MALAYSIA

v.

PRESTON CORP. (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL SUIT NO. 850 OF 1978]
9 JUNE 1981

REVENUE LAW: *Income Tax - "Penalty" under s. 113(2) Income Tax Act 1967 - Additional tax - Whether penalty due and payable on service of notice of additional assessment - Sections 125(2), 106 - Summary judgment - Taxpayer aggrieved by assessment - Remedy - Section 99(1) - Special Commissioners - Plea of limitation - Section 6(4) Limitation Ordinance - Whether s. 125(2) Income Tax Act prevails over s. 6(4) Limitation Ordinance - Sections 91(1)(2)(b), 101(1), 102(2), 103(4), 106(3).*

The plaintiff sued the defendant for a total sum of RM105,911.85 being amounts assessed under the Income Tax Act, 1967 in respect of the year of assessment 1971 and 1974 and applied for liberty to enter judgment as there was no defence to the action. The defendant opposed the application and applied for unconditional leave to defend.

In respect of the year of assessment 1971, the Director-General of Inland Revenue issued to the defendant notice of additional assessment dated 27.7.1974 in which a penalty of RM93,983.50 was imposed under s. 113(2) of the Act after taking into account certain payments made previously by the defendant. Subsequently, the defendant paid a sum of RM600 leaving a balance of RM93,383.50, but failed to pay the balance within 30 days after the service of the notice of additional assessment. The plaintiff included in the claim a further sum of RM9,328.35 being the amount of increase under s. 103(4) of the Act.

In respect of the year of assessment 1974, the Director-General served on the defendant a notice of additional assessment dated 14.9.1974 wherein a demand was made for payment of a total sum of RM134,206.95 consisting of s. 113(2) penalty of RM3,000 and the balance being tax. The defendant paid the tax but not the penalty. The plaintiff sued the defendant for recovery of the penalty, and since the defendant had not paid the penalty within 30 days of the service of the notice of assessment, the plaintiff also included in its claim a further sum of RM300 being the amount of increase under s. 103(4).

The defendant contended that the Director-General could impose a penalty under s. 113(2) only if the conditions specified in s. 113 exist, and since such conditions did not exist in this case, the issue should be tried before the judgment could be entered. The plaintiff contended that the s. 113(2) penalty of RM93,983.50 in respect of the year of assessment 1971 and RM3,000 in respect of the year of assessment 1974 became due and payable on the service of the notices of additional assessment and it was not open to the defendant to raise the issue in this suit.

The defendants also submitted that it was too late for the plaintiff to institute this action on the ground that it has been time-barred under s. 6(4) of the Limitation Ordinance.

Held:

[1] Notices of the assessment of the penalty were served on the defendant and therefore the penalty became due and payable on the service of the notice of assessment.

[2] It is not open to the defendant to contest in this suit that the penalty was wrongly imposed. The imposition of the penalty is an assessment, and the assessment of penalty is subject to appeal to the Special Commissioners under s. 99(1). In order to contest against the penalty the defendant should lodge an appeal to the Special Commissioners.

[3] If the Special Commissioners uphold the imposition of the penalty the defendant could appeal further to the High Court under para. 34 of Schedule 5 to the Act. It is only when a further appeal is brought to the High Court in this way that the High Court will have the jurisdiction to hear and decide on the question of whether the penalty has been wrongly imposed.

[4] There is no time limit within which to recover tax after tax is assessed in proper time, although there is provision limiting the time within which tax can be assessed, e.g. ss. 91(1) and 91(2)(b) of the Income Tax Act. Since s. 125(2) of the Act has been introduced after the enactment of s. 6(4) of the Limitation Ordinance, s. 125(2) prevails over s. 6(4) in so far as penalty under s. 113(2) is concerned.

[5] There is no defence to the plaintiff's claim and accordingly an order in terms of the summons is granted.

[Order in terms of summons.]

Case referred to:
Government of Malaysia v. Ng Song Choon [1975] 1 MLJ 131

Legislation referred to:
Income Tax Act 1967, ss. 91(1), (2), 99(1), 102(2), 103, (4), (5), (5A), 106, (3), 113, (2), 125(2), 152
Limitation Ordinance 1953, s. 6(4)

For the plaintiff - Jaafar bin Mat Saman
For the defendant - R.R. Sethu; Sethu, Ghazali & Gomez

JUDGMENT

Wan Hamzah J:

The plaintiff sues the defendant for a total sum of RM105,911.85. By this summons the plaintiff applies for liberty to enter judgment on the ground that there is no defence to the action. The defendant opposes this application and asks for unconditional leave to defend. The sum claimed consists of amounts assessed under the Income Tax Act 1967 in respect of the year of assessment 1971 and the year of assessment 1974.

In respect of the year of assessment 1971 the Director-General of Inland Revenue issued to the defendant notice of additional assessment dated 27 July 1974, in which a penalty of RM93,983.50 was imposed under s. 113(2) of the Act. The notice of additional assessment shows certain payments previously made by the defendant as the result of which there is a small credit. This credit being taken into account, demand is made in the notice of additional assessment for payment of RM93,883.50 being the net amount of the s. 113(2) penalty. Subsequently the defendant paid a sum of RM600, leaving a balance of RM93,283.50, but failed to pay the balance within 30 days after the service of the notice of additional assessment. Therefore when bringing this action the plaintiff includes in the claim a further sum of RM9,328.35 being the amount of increase under s. 103(4) of the Act.

In respect of the year of assessment 1974 the Director-General served on the defendant a notice of additional assessment dated 14 September 1974 wherein a demand was made for payment of a total sum of RM134,206.95 consisting of s. 113(2) penalty of RM3,000 and the balance being tax. The defendant paid up the tax but not the penalty. Therefore the plaintiff sues the defendant for recovery of the penalty, and since the defendant had not paid the penalty within 30 days of the service of the notice of assessment the plaintiff also includes in its claim a further sum of RM300 being the amount of increase under s. 103(4).

The defendant contends that the Director-General can impose a penalty under s. 113(2) only if the conditions specified in s. 113 exist, and avers that in this case such conditions do not exist and therefore this issue should be tried before judgment can be entered. On the other hand the plaintiff contends that the s. 113(2) penalty of RM93,883.50 in respect of the year of assessment 1971 and RM3,000 in respect of the year of assessment 1974 became due and payable on the service of the notices of additional assessment and it is not open to the defendant to raise in this suit the ground that the imposition of the penalty was wrong and not in accordance with the provisions of s. 113. With this contention of the plaintiff I agree.

Section 125(2) provides:

> Any penalty imposed on any person under s. 113(2) shall be collected as if it were part of the tax payable by that person, but shall not be treated as tax so payable for the purposes of any provision of this Act other than ss. 103 to 106.

So s. 103 applies to the s. 113(2) penalty as if the penalty were tax. Section 103(2) provides:

> Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

In the present case notices of the assessment of the penalty were served on the defendant and therefore the penalty has become due and payable on the service of the notice of assessment. Section 125(2) also makes it clear that s. 106 applies to the penalty. Section 106 provides:

> (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
>
> (2) ....
>
> (3) In any proceedings under this section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4), (5) or (5A).

The defendant's contention that the Director-General was wrong to impose the penalty under s. 113(2) on the ground that the conditions stipulated in s. 113 did not exist, is a plea that the penalty was incorrectly assessed and therefore such plea cannot be entertained in this suit. Since it is not open to the defendant to contest in this suit that the penalty was wrongly imposed, the question arises where and when it can do so. I have no doubt that it can do so by bringing an appeal to the Special Commissioners of Income Tax in accordance with s. 99(1) which provides:

> A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving the Director-General ... a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

It should be noted that s. 99(1) refers to "assessment" generally, and not specifically to "assessment of tax". The question may be asked whether the Director-General in fact "made an assessment" when he imposed the penalty. In my opinion there should not be any doubt as to this. The notices which were served on the defendant giving notification of the imposition of the penalty were notices of assessment in Form JA which is a form prescribed under s. 152 of the Act. The prescribed form contains a column for penalty imposed under s. 113(2). Therefore the imposition of the penalty is an assessment, and the assessment of penalty is subject to appeal to the Special Commissioners under s. 99(1). So, in order to contest against the penalty the defendant should lodge an appeal to the Special Commissioners. If the Special Commissioners uphold the imposition of the penalty the defendant can appeal further to the High Court under para. 34 Schedule 5 to the Act. It is only when a further appeal is brought to the High Court in this way that the High Court will have the jurisdiction to hear and decide on the question of whether the penalty has wrongly been imposed.

It appears from the defendant's affidavit that it has given to the Director-General notice of appeal against the assessment of the penalty but the Director-General has not forwarded it to the Special Commissioners. Section 102(2) provides:

> ... if an appellant has complied to the best of his ability with all requirements (if any) of the Director-General under s. 101(1), he may after the expiration of a period of six months beginning with the giving of the notice of appeal request the Director-General in writing to send the appeal forward to the Special Commissioners, and the Director-General shall send the appeal forward accordingly within three months after receiving any such request.

There is no reason why the defendant should not take action under s. l02(2) to get his appeal heard by the Special Commissioners. If the Director-General refuses to send the defendant's appeal forward to the Special Commissioners in accordance with the section, the defendant can have recourse to a proper remedy in the Court.

On behalf of the defendant it is further submitted that it is too late for the plaintiff to bring this action on the ground that it has been time-barred under s. 6(4) of the Limitation Ordinance, which reads:

> An action to recover any penalty or forfeiture of sum by way of penalty or forfeiture recoverable by virtue of any Ordinance or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued.

As I have pointed out, s. 125(2) of the Income Tax Act provides that any penalty on any person under s. 113(2) shall be collected as if it were part of the tax payable by that person and that s. 103 applies to the penalty. In my opinion, this means that if tax can be collected and recovered at any time without being subject to any law of limitation, the penalty can also be collected and recovered at any time without being subject to any law of limitation. I am not aware of any law which prescribes the time limit within which to recover tax after tax is assessed in proper time, although there is provision limiting the time within which tax can be assessed, e.g. ss. 9l(l) and 91(2)(b) of the Income Tax Act. One should not confuse the two time limits, i.e. time limit within which to assess tax or penalty and time limit within which to recover tax or penalty after it has been assessed. Since s. 6(4) of the Limitation Ordinance is intended to be a general provision applying to penalties generally whereas s. 125(2) of the Income Tax Act is intended to apply specifically to penalty under s. 113(2) of the Act and since s. 125(2) of the Act has been introduced after the enactment of s. 6(4) of the Ordinance, in my opinion s. 125(2) of the Act prevails over s. 6(4) of the Ordinance in so far as penalty under s. 113(2) of the Act is concerned.

As regards the plaintiff's claim for the sums of RM9,328.35 and RM300 being increases arising by virtue of s. 103(4), these are increases in the s. 113(2) penalty and therefore ss. 125(2) and 106 apply to them. Section 106(3) clearly provides that the Court shall not entertain any plea that the amount sought to be recovered is incorrectly increased under s. 103(4).

In support of the contention that limitation is a good plea Counsel for the defendant cited the case of *Government of Malaysia v. Ng Song Choon* [1975] 1 MLJ 131. It appears that in that case the taxpayer contested the Government's claim for income tax on the ground that the assessment of the tax was made out of time, i.e. after the expiry of the twelve years period prescribed under s. 91(1) of the Income Tax Act.

The Senior Assistant Registrar gave the defendant unconditional leave to defend on the ground that a triable issue was disclosed. On appeal the High Court upheld the Senior Assistant Registrar's decision. In his judgment Arulanandom J described the issue raised by the taxpayer in that case as follows:

> It is essentially a legal issue and it falls outside the scope of s. 106(3) which only lays down that the Courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5). In this case no such plea is being raised before the Court and therefore in strictly construing the section the Court should not extend it to mean no plea shall be entertained by the Court.

From the report it does not appear that attention of the learned Judge was drawn to s. 99(1) of the Income Tax Act. If that section was referred to him, he might have come to a different conclusion and might have held that the issue raised was an issue to be tried by the Special Commissioners and that the High Court has no jurisdiction to try it in the first instance but only on appeal from the Special Commissioners' decision. With due respect, my, own view is that a contention that the assessment of tax was made out of time in contravention of s. 91(1) is a plea that the tax was incorrectly assessed within the meaning of s. 106(3).

In the present case I hold that there is no defence to the plaintiff's claim and I accordingly grant an order in terms of the summons.

Also found at [1982] CLJ 195